notice to quit, **but all joint owners must sue for possession and judgment for possession cannot be given in favour of one only.**" On the other end of the scale, O. 15 r. 6(1) of the Rules of the High Court 1980 prevents an action from being defeated by the misjoinder or non-joinder of plaintiffs or defendants and allows, subject to certain principles, for the addition, substitution or striking out of persons as plaintiffs, similarly of defendants, intervention of persons not parties to the action and for misnomer, so submitted learned Counsel for the respondent/plaintiff. Such an argument would show that questions of law do exist and that seems to be the stand adopted by the respondent/plaintiff in his affidavit-in-reply (enclosure 11A) at paragraph 11 where he says:

> Saya juga ingin merujuk kepada Perenggan 8 dan 9 afidavit defendan, dan ingin menegaskan di sini, isu-isu tersebut adalah isu-isu undang-undang yang patut diselesaikan semasa pendengaran rayuan sibil tersebut.

There is another matter that merits consideration. It is this. Before the Judge, Sessions Court, Taiping, Perak delivered her judgment on 26 April 1993, the respondent/plaintiff at his own peril and risk, jointly entered with the co-proprietors of the land into an agreement with Koi Kim Seng Development Sdn. Bhd. on 15 September 1992, to develop the land. The land has since been developed almost to its completion but for the presence of the wooden zinc stall belonging to the appellant/defendant (a real eyesore, see the photographs at exhibit "LS4" in enclosure 11A). Once the wooden zinc stall is removed, development would start and this would in turn cause serious or irreparable injury to the appellant/defendant if the stay is not granted (see *Ajaib Singh v. Jeffrey Fernandez* [1971] 1 MLJ 139). I would therefore agree with Mr Gurbachan Singh that there are materials in the appellant/defendant's affidavit for granting stay of execution and I so order. Costs to be costs in the cause.

Stay of execution granted.

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**PATRICK DAYEY**

**v.**

**PUBLIC PROSECUTOR**

HIGH COURT, SIBU
TUAN STEVE L.K. SHIM J.
[CRIMINAL APPEAL NO 2 OF 1994]
23 MAY 1994

***CRIMINAL LAW: Charge of criminal breach of trust - Whether prosecution had proved its case beyond reasonable doubt - Whether there was dishonest misappropriation of property.***

The accused was charged with criminal breach of trust in respect of one television set. The prosecution's case was that the accused had entered into a hire-purchase agreement for the purchase of a National 20" coloured TV set on 27 September 1983. Upon the accused's default in the monthly repayments, the hire-purchase company sought to repossess the TV set but was informed by the accused that the TV set was not in the house. It was also the case for the prosecution that the accused had sought the assistance of two of his colleagues (PW7 and PW8) in selling the TV set and that the TV set was in fact sold to a businessman on 26 September 1983.

On the accused's conviction by the lower Court, the question that arose on appeal was firstly whether the prosecution had established conclusively that the TV set bought by the accused was the same TV set allegedly sold by him and secondly whether there was in fact dishonest misappropriation of property by the accused.

**Held:**

**[1]** Reading the judgment of the learned Magistrate as a whole, it seems clear that she was very much influenced by the evidence of PW7 and PW8 who had testified that they had sold the TV set at the request and on behalf of the appellant. In holding that there was a *prima facie* case, the learned Magistrate had failed to realise that the TV set sold by PW7 and PW8 could not possibly be the same TV set which the appellant had bought through the hire purchase agreement given the fact that it was in evidence that PW7 and PW8 had sold the TV set on 26 September 1983 whereas the hire purchase agreement was entered into on 27 September 1983.

**[2]** There was no evidence that the appellant had disposed of the TV set in any way, wherein

the evidence showed that the appellant had merely told the repossessor that the TV set was not in his house. In the circumstances, in the absence of other additional factors, the mere fact that the appellant had failed to account for the TV set did not suggest there was dishonest misappropriation of the same on his part.

**[3]** The learned Magistrate, by placing emphasis on the testimonies of PW7 and PW8, had misdirected herself on the issue of dishonest misappropriation which formed an essential element for the offence of criminal breach of trust. In the circumstances the learned Magistrate had erred in law in holding that the prosecution had proved its case against the appellant beyond reasonable doubt.

*[Appeal allowed].*

**Cases referred to:**
*Harakrishna Mahatab v. Emperor [1930] AIR Daka 209* ***(refd)***
*Wickrasooriya v. Public Prosecutor [1964] 30 MLJ 28* ***(refd)***
*Navaratnam v. Public Prosecutor [1973] 1 MLJ 154* ***(refd)***
*Abdul Aziz v. Public Prosecutor [1963] 29 MLJ 16* ***(refd)***
*Sathiadas v. Public Prosecutor [1970] 2 MLJ 241* ***(refd)***

**Legislation referred to:**
Penal Code, ss. 24, 406

*For the appellant - Joseph Tang; M/s Tang & Co.*
*For the respondent - Nik Suhaimi, DPP*

**JUDGMENT**

**Steve L.K. Shim J:**
In the Magistrate's Court, the appellant Patrick Dayey, was charged as follows:

> That you on or about 27 September 1983 in the evening, at kampung Nyabor Road, Sibu, in the State of Sarawak, being entrusted with certain property, to wit, one television set brand 'National' Model TC-20TBK, serial number. 3364573 valued about RM1,750, committed criminal breach of trust in respect of the said property and you thereby committed an offence punishable under s. 406 of the Penal Code.

At the conclusion of the trial, he was found guilty of the said charge and was sentenced to one year imprisonment and a fine of RM1,000 in default one month imprisonment. The appellant has appealed against his conviction and sentence. In his petition, he has advanced 5 grounds of appeal but I think they can reasonably be compressed into one and this relates to whether the learned Magistrate had erred in law in holding that the prosecution had proved its case against the appellant beyond reasonable doubt.

At the outset, it is, I think, not inappropriate to set out briefly the prosecution's case, namely, that the appellant had, on 27 September 1983, together with the proprietor of Syarikat Johnson, gone to Multi-Mortgage & Credit Sdn. Bhd. (the company) for the purpose of seeking a loan in order to purchase a 20" coloured TV set of the "National" brand from Syarikat Johnson; that after a hire-purchase agreement was entered into between the appellant and the company, the appellant duly took delivery of the said TV set as the hirer and the company as the owner thereof; that when the appellant subsequently defaulted in his instalment payments, the company issued him notice of due payment and when this was ignored, the company proceeded to issue a letter of authority to repossess to its company repossessor one Lim Ben Chuan who then went to the appellant's house where he met the appellant who told him, upon being asked, that the said TV set was not in the house. According to Lim, the appellant did not say anything else. It was also the prosecution's case that on 26 September 1983, the appellant had sought the assistance of two police constables who were his colleagues in selling the said TV set and that the set was infact sold to one Ting Tiong Tai, a businessman.

In my view, it is sufficient to deal with the issue of whether the learned Magistrate had erred in the manner afore-mentioned by considering the two factors which will effectively dispose of this appeal. First, there is a submission of Mr Joseph Tang, Counsel for the appellant, that the prosecution had not established conclusively that the TV set allegedly bought by the appellant was the same TV set allegedly sold by him. From the notes of evidence it seems clear that the appellant had bought the TV set, subject matter of the charge, from Syarikat Johnson through a hire-purchase agreement on 27 September 1983, and that this TV set was delivered to him on the same date. However, the evidence also shows that the appellant had approached his two colleagues Cpl. Abdul Rahman (PW7) and P.C. Isa bin Wahab (PW8) on 26 September 1983 seeking their assistance in selling a TV set which, according to the appellant, belonged to

his brother. This TV set was then sold to one Ting Tiong Tai (PW6), a businessman, apparently on 26 September 1983. Hence, on the evidence adduced by the prosecution, the appellant appeared to have sold a TV set a day before he went to purchase another TV set from Syarikat Johnson on a hire-purchase agreement made between him and the company. In short, he had apparently sold a TV set which, he alleged, belonged to his brother on 26 September 1983 and thereafter on 27 September 1983, he went to Syarikat Johnson and bought another set through a hire-purchase agreement. Clearly therefore, there were two sets involved, namely, one sold by the appellant on 26 September 1983 and the other bought by him on 27 September 1983. There is an obvious discrepancy here. The learned Magistrate appeared not to have appreciated this discrepancy. This is reflected in a passage of her ruling on page 40 of the appeal record which states:

> PW8 and PW7 in their testimonies to the Court said that they were requested by the accused person to sell the said TV set as his brother who worked in the army is in need of money. PW8 was told by the accused person that the TV set belong to him. PW8 together with PW7 who was earlier on approached by the accused to carry one box which contained one TV set, went to an electrical shop near to the bus station for the purpose of asking the taukey (PW6) whether he agrees to buy the said TV. PW6 bought the TV for the sum of RM1020 ...
>
> Now, this Court having heard the evidence produced by the prosecution witnesses, rules that the prosecution has proved a *prima facie* case against the accused in which evidence was produced that the accused was entrusted with one property i.e. one TV National under a Hire Purchase Agreement (Ex . P3 ) and **subsequently sells it to PW6 without making payments in full to the complainant** (PW2) whom he has hired it. I accordingly called upon the accused to enter his defence ...

From the part underscored, it does appear that the learned Magistrate had infact relied upon the evidence of PW7 and PW8 as regards their allegation that they had sold the TV set at the request and on behalf of the appellant. On the evidence as recorded in the Magistrate's Court, the TV set alleged to have been sold by PW7 and PW8 could not possibly be the same TV set purchased by the appellant from Syarikat Johnson through the hire-purchase agreement made between him and the company. In the circumstances, there is therefore merit in the submission of Mr Tang on this account.

Secondly, there is the issue of dishonest misappropriation, one of the essential elements constituting the offence of criminal breach of trust. What is dishonest misappropriation of property? To misappropriate means improperly setting apart for one's use to the exclusion of the owner. To convert means appropriation and dealing with property of another without right as if it is his own property. Dishonest intention is the gist of the offence. Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so. And s. 24 of the Penal Code defines "dishonestly" as whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person. In this connection, it may be pertinent to restate the principle enunciated by Ali J in *Harakrishna Mahatab v. Emperor* [1930] AIR Daka 209: 31 Cr. L. J. 249, which was adopted first by Ismail Khan J (as he then was) in *Wickrasooriya v. Public Prosecutor* [1964] 30 MLJ 28 and later by Ali FJ in *Navaratnam v. Public Prosecutor* [1973] 1 MLJ 154 which states:

> It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused because under the law even temporary retention is an offence provided it is dishonest ... the essential thing to be proved in cases of criminal breach of trust is whether the accused was actuated by intention is not a matter of direct proof, the courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had *mens rea* for the crime. So in cases of criminal breach of trust, the failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. We should however not lose sight of the principle and make a universal formula of what is after all only an indication of or a piece of evidence pointing to dishonest intention.

The last sentence in the above passage, which appears to be something of a cautionary reminder, must have been made in the light of his observation in the previous case of *Abdul Aziz v. Public Prosecutor* [1963] 29 MLJ 16 when he

remarked that in a charge of criminal breach of trust, mere failure to account was not sufficient evidence of misappropriation and that it was necessary to examine the surrounding circumstances and to be satisfied whether misappropriation could be inferred. This position was adopted by Raja Azlan Shah J (as he then was) in *Sathiadas v. Public Prosecutor* [1970] 2 MLJ 241 wherein he said *inter alia*:

> It is settled law that mere failure of the appellant to account for the monies entrusted to him ... might not be a foundation of his conviction in all cases but where he was unable to account and render an explanation for his failure which was not true, an inference of misappropriation with dishonest intent might readily be made.

In the light of the principle stated in the cases aforesaid, what is the position in the instant case under appeal? Here, there is evidence that after the hire-purchase agreement was made between the company and the appellant, the TV set in question was delivered to the appellant. He took possession of the said TV set. Evidence has also been led that after the company's notice on due payments was ignored by the appellant, the company directed its repossessor Lim Ben Chuan (PW3) to repossess the TV set and when PW3 went to the appellant's house to effect repossession thereof, he was told by the appellant that the TV set was not in the house. The appellant did not mention anything else. This might be construed as a failure to account for the TV set which was entrusted to him by the company. However, can such a failure to account, without more, be sufficient evidence of dishonest misappropriation? It should be noted that there is no evidence that the appellant had disposed of the said TV set in any way. The appellant had merely told the repossessor PW3 that the TV set was not in his house. This would not necessarily mean that he had disposed of it, etc, but it could mean that he had placed it in a place outside his house. The prosecution had attempted to show that the appellant had infact sold the said TV set to one Ting Tiong Tai (PW6), a businessman, but as I have already discussed, this allegation is quite inconceivable and unlikely having regard to the evidence adduced in the Magistrate's Court. In the circumstances, in the absence of other additional factors, the mere fact that the appellant had failed to account for the TV set did not suggest there was dishonest misappropriation of the same on his part.

Reading the judgement of the learned Magistrate as a whole, it seems clear that she was very much influenced by the evidence of PW7 and PW8 who had testified in effect that they had sold the TV set at the request and on behalf of the appellant at the material time. This is evident in the passage of her ruling on page 40 of the appeal record which I have already cited. In holding that there was a *prima facie* case, the learned Magistrate had quite obviously failed to realise that the TV set sold by PW7 and PW8 on behalf or at the request of the appellant could not possibly be the same TV set which the appellant had bought from Syarikat Johnson through a hire-purchase agreement made between him and the company. In my view, the learned Magistrate's erroneous approach continued to subsist at the time she gave judgement as could be reflected in a passage therein on page 57 of the appeal record which states:

> This Court, having carefully considered and weighed the evidence given by the accused in the light of the prosecution case in the totality I find that the defence story has not cast any doubt on the prosecution case.

By the use of the words "in the light of the prosecution's case in the totality" the learned Magistrate had clearly placed emphasis on the testimonies of PW7 and PW8 and in so doing, she had therefore misdirected herself on the issue of dishonest misappropriation which formed an essential element for the offence of criminal breach of trust.

In the circumstances and for the reasons given, I am of the view that the learned Magistrate had erred in law in holding that the prosecution had proved its case against the appellant beyond reasonable doubt. The appeal against conviction is therefore allowed.